APPEAL NO. 051779
FILED SEPTEMBER 14, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). This case is back before us after our remand in Appeals Panel Decision (APD) 050926, decided June 9, 2005. We had remanded that case to reconstruct the record because the record of the original contested case hearing (CCH) was incomplete. A CCH was held on July 12, 2005, to reconstruct the testimony missing from the original CCH record. The hearing officer resolved the disputed issues after the CCH on remand, by deciding that the appellant/cross-respondent (claimant) is not entitled to change treating doctors to (Dr. B) pursuant to Section 408.022 and that the claimant only had disability beginning on May 10 and continuing through November 17, 2004, and at no other times. The claimant appealed, disputing her entitlement to change treating doctors to Dr. B and arguing that disability continued after November 17, 2004. The respondent/cross-appellant (carrier) responded, urging affirmance of the determinations disputed by the claimant. The carrier appealed, arguing that the claimant failed to serve them with a copy of her request for review after the original CCH. The carrier contends that since the claimant failed to follow the service requirements outlined in Section 410.202 and 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3), her appeal should be deemed untimely and the hearing officer's decision and order dated March 24, 2005, should be the final decision of the Texas Department of Insurance, Division of Workers' Compensation (Division). The claimant responded, denying failure to serve the carrier with her request, and contends that the failure of service is not jurisdictional.

DECISION

Affirmed in part and reversed and rendered in part.

We first address the carrier's cross-appeal. The carrier contends that the claimant failed to serve it with her request for review after the CCH held on March 17, 2005, and that therefore the claimant's appeal was untimely and should not have been considered. The failure of a party to serve an appeal on the other party may have the effect of extending the time that the other party has to file a response, but it does not deprive the Appeals Panel of jurisdiction over the appeal. APD 041161, decided July 5, 2004.

CHANGE OF TREATING DOCTOR

The claimant contends that the hearing officer applied an incorrect standard of review in determining the change of treating doctor issue. The claimant contends that the hearing officer specifically found that the Division abused its discretion in approving the change of treating doctor request. However, the specific finding was that the claimant changed treating doctors from (Dr. H) to Dr. B in order to secure a new medical report and concluded that the claimant is not entitled to change treating doctors to Dr. B

pursuant to Section 408.022. The hearing officer did note in his discussion that the [Division] abused its discretion in approving the second request to change treating doctors. The Appeals Panel addressed the standard to be used in reviewing a change of treating doctor in APD 020022, decided February 14, 2002, and APD 022245, decided October 22, 2002. In APD 020022, *supra*, the Appeals Panel stated that while the Division has previously considered changes of treating doctor in language encompassing "abuse of discretion," Advisory 2001-01, dated January 15, 2001, reflected a concern of the Division that inconsistency was to be avoided in approving such changes and that the issue was "expressly broader than merely an abuse of discretion in approval of the [Texas Workers' Compensation Commission-53]." In APD 022245, *supra*, the issue was framed, as it was in this case, as whether the claimant was "entitled to change treating doctors." The Appeals Panel cited APD 020022 and held that the issue is "broader than whether a particular [Division] employee who approved the change abused his or her discretion." The hearing officer was to evaluate whether a change should be allowed in accordance with the standards set forth in Section 408.022 and Rule 126.9 and the hearing officer is not limited to considering a change of treating doctor issue only in terms of whether the Division abused its discretion. APD 020414, decided April 3, 2002. Our review of the record indicates that, while the hearing officer mentioned abuse of discretion, he properly applied Section 408.022 and Rule 126.9.

DISABILITY

It was undisputed that the claimant sustained a compensable injury to her right knee on _____. The hearing officer found that the claimant had disability beginning on May 10 and continuing through November 17, 2004, and at no other times. The claimant appealed this determination contending that she had disability beyond November 17, 2004. The claimant contends that the hearing officer used the wrong standard to end disability and that his determination that disability ended on November 17, 2004, was against the overwhelming weight of the evidence. Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. In a Work Status Report (TWCC-73), Dr. H released the claimant to work with restrictions on November 2, 2004. The restrictions were listed as desk work only, if on Celebrex. It was undisputed that the claimant's regular duty was as a patrol officer and that no doctor had released the claimant to return to work full duty. There was evidence that the employer had offered a light duty position to the claimant and that on November 17, 2004, the claimant attempted to return to work but stayed only one hour. The claimant testified that she was in too much pain to work at a desk job. The hearing officer noted that light duty work was offered by the employer on November 17, 2004, and that the "claimant failed to take proper advantage of such an opportunity to earn her preinjury wage on her own accord." We note that whether or not the employer tendered a bona fide offer of employment was not an issue before the hearing officer.

The parties stipulated that the claimant last worked on _____, and was not working through the date of the initial CCH, March 17, 2005. The claimant correctly

notes that the Appeals Panel has previously stated that a claimant under a light-duty release does not have an obligation to look for work or show that work was not available within his restrictions. APD 022908, decided January 8, 2003. Further, no evidence was presented regarding the claimant's preinjury wage or the number of hours the claimant worked prior to her compensable injury. Additionally, no evidence was presented regarding the wages being offered to the claimant for performance of light duty position offered or the specific number of hours the claimant would be expected to work at light duty. Therefore, the hearing officer's determination that the claimant's disability ended on November 17, 2004, is against the great weight and preponderance of the evidence and was error. It is impossible to determine from the evidence presented that if the claimant had accepted the light duty offer she would have been able to obtain and retain employment at her preinjury wage.

We affirm the hearing officer's determination that the claimant is not entitled to change treating doctors to Dr. B pursuant to Section 408.022. We reverse the hearing officer's finding that the claimant only had disability beginning on May 10 and continuing through November 17, 2004, and at no other times, and render a new determination that the claimant had disability beginning on May 10 and continuing through March 17, 2004, the date of the CCH (before remand).

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

NAME
ADDRESS
CITY, TEXAS ZIP CODE.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge